

FERNANDO G. LOPEZ, AN-1753, )  
 Plaintiff(s), ) No. C 13-3870 CRB (PR)  
 v. )  
 SERGEANT CLOUS, et al., ) ORDER REGARDING  
 Defendant(s). ) DEFENDANTS' MOTION FOR  
 ) SUMMARY JUDGMENT AND  
 ) REFERRING MATTER FOR  
 ) SETTLEMENT PROCEEDINGS  
 ) (Dkt. 18)

Plaintiff, a prisoner at San Quentin State Prison, filed a pro se complaint under 42 U.S.C. § 1983 alleging that on September 21, 2011, while he was driving on Southwest Expressway and Liegh Avenue in San Jose, Santa Clara “police officers” pulled him over, threw him out of his car and onto the ground, and proceeded to assault and beat him. Plaintiff specifically alleges that Sergeant Clous and officers Nick Nguyen, Ken Henderson, Aric Enos, Justin Mead, Luis Martin and John Pate “beat me severely by punching me, and kicking me repeatedly to the point of me losing consciousness and then continued to punch and kick my face in.” Verified Compl. (dkt. 1) ¶ 11.

Per order filed on December 17, 2013, the court found that, liberally construed, plaintiff's allegations state a cognizable § 1983 claim for damages against Sergeant Clous and officers Nick Nguyen, Ken Henderson, Aric Enos, Justin Mead, Luis Martin and John Pate, and ordered the U.S. Marshal to serve them. Defendants now move for summary judgment on the ground that there are no material facts in dispute and that they are entitled to judgment as a matter of law. The officer defendants also claim that they are entitled to qualified immunity. Plaintiff filed an opposition and defendants filed a reply.

## DISCUSSION

### A. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits show that there is “no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, as is the case here, the moving party need only point out “that there is an absence of evidence to support the nonmoving party’s case.” Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings to demonstrate the existence of a genuine dispute of material fact by “citing to specific parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute.” Fed. R. Civ. P. 56(c). A triable dispute of fact exists only if there is sufficient evidence favoring the nonmoving party to allow a jury to return a verdict for that party. Anderson, 477 U.S. at 249. If the nonmoving party fails to make this showing, “the moving party is entitled to judgment as a matter of law.”

1 Celotex, 477 U.S. at 323.

2 B. Legal Claim

3 Defendants argue that they are entitled to qualified immunity from  
4 plaintiff's claim that they used excessive force in violation of the Fourth  
5 Amendment. Under Saucier v. Katz, 533 U.S. 194 (2001), the court must  
6 undertake a two-step analysis when a defendant asserts qualified immunity in a  
7 motion for summary judgment. The court first faces "this threshold question:  
8 Taken in the light most favorable to the party asserting the injury, do the facts  
9 alleged show the officer's conduct violated a constitutional right?" 533 U.S. at  
10 201. If the court determines that the conduct did not violate a constitutional right,  
11 the inquiry is over and the officer is entitled to qualified immunity.

12 If the court determines that the conduct did violate a constitutional right, it  
13 then moves to the second step and asks "whether the right was clearly  
14 established" such that "it would be clear to a reasonable officer that his conduct  
15 was unlawful in the situation he confronted." Id. at 201-02. Even if the violated  
16 right was clearly established, qualified immunity shields an officer from suit  
17 when he makes a decision that, even if constitutionally deficient, reasonably  
18 misapprehends the law governing the circumstances he confronted. Brosseau v.  
19 Haugen, 543 U.S. 194, 198 (2004); Saucier, 533 U.S. at 205-06. If "the officer's  
20 mistake as to what the law requires is reasonable . . . the officer is entitled to the  
21 immunity defense." Id. at 205.<sup>1</sup>

22 Under the Fourth Amendment, police officers may only use such force as  
23 is "objectively reasonable" under the circumstances. Graham v. Connor, 490

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25 <sup>1</sup>Although the Saucier sequence is often appropriate and beneficial, it is  
26 not mandatory. A court may exercise its discretion in deciding which prong to  
27 address first, in light of the particular circumstances of each case. See Pearson v.  
28 Callahan, 555 U.S. 223, 236 (2009).

1 U.S. 386, 397 (1989). To determine whether the force used was reasonable,  
2 courts balance the nature and quality of the intrusion on the individual's Fourth  
3 Amendment interests against the countervailing governmental interests at stake.  
4 Id. at 396. The "reasonableness" of a particular use of force must be judged from  
5 the perspective of a reasonable officer on the scene, rather than with the 20/20  
6 vision of hindsight. Id. Because the reasonableness test is not capable of precise  
7 definition or mechanical application its proper application requires careful  
8 attention to the facts and circumstances of each particular case, including "the  
9 severity of the crime at issue, whether the suspect poses an immediate threat to  
10 the safety of the officers or others, and whether he is actively resisting arrest or  
11 attempting to evade arrest by flight." Id.

12 In addition, the court's consideration of "reasonableness must embody  
13 allowance for the fact that police officers are often forced to make split-second  
14 judgments – in circumstances that are tense, uncertain, and rapidly evolving –  
15 about the amount of force that is necessary in a particular situation." Id. at 396-  
16 97. Nor every push or shove, even if it may later seem unnecessary in the peace  
17 of a judge's chambers, violates the Fourth Amendment. Id. at 396.

18 1. Defendants' evidence

19 In support of their motion for summary judgment and qualified  
20 immunity, defendants submitted various declarations and documentary evidence  
21 showing the following facts: On September 21, 2011, Santa Clara Police  
22 Department (SCPD) officers received information pertaining to the whereabouts  
23 of plaintiff, who was a possible arson suspect and had an outstanding warrant for  
24 an unrelated assault. Martin Decl. (dkt. 25) ¶¶ 2-3; Mead Decl. (dkt. 26) ¶¶ 2-3;  
25 Nguyen Decl. (dkt. 27) ¶¶ 2-3. After conducting surveillance at the apartment  
26 residence the officers believed plaintiff to be, Sergeant Clouse and Detective  
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1 Thompson followed another resident of the apartment away from the residence  
2 and stopped her. Clouse Decl. (dkt. 22) ¶ 4. She informed them that she knew  
3 plaintiff, that he was hostile to the police, would “fight or run” if contacted by the  
4 police, and might have a sawed-off shotgun in his possession. Id. Clouse relayed  
5 this information to the officers who were still surveying the residence. Id. ¶ 5.

6 Shortly after, officers Martin and Mead, still surveying the residence,  
7 observed plaintiff get into a car and drive away from the residence. Martin Decl.  
8 ¶¶ 4-6; Mead Decl. ¶¶ 4-5. They followed plaintiff in an unmarked SCPD  
9 vehicle, and Officer Nguyen followed in another unmarked vehicle behind Mead  
10 and Martin. Nguyen Decl. ¶ 5; Martin Decl. ¶ 6; Mead Decl. ¶¶ 5-6. The three  
11 officers followed plaintiff onto the Southwest Expressway and continued to  
12 follow him until he pulled over to the right curb and parked. Mead Decl. ¶ 6;  
13 Nguyen Decl. ¶ 6. Believing that plaintiff suspected the police was following  
14 him and might be planning an escape, Martin parked his vehicle in front of  
15 plaintiff’s to prevent him from driving forward. Martin Decl. ¶ 8. Nguyen  
16 positioned his vehicle one hundred feet behind plaintiff’s to prevent him from  
17 driving backward. Martin Decl. ¶ 9; Mead Decl. ¶ 6; Nguyen Decl. ¶ 6. Mead  
18 then exited his vehicle (which Martin was driving) with his pistol drawn and  
19 yelled “Stop! Police.” Mead Decl. ¶ 7. Plaintiff immediately drove in reverse  
20 against oncoming traffic and towards Nguyen’s vehicle, stopping just before  
21 colliding with it. Martin Decl. ¶ 6; Mead Decl. ¶ 8; Nguyen Decl. ¶ 10.

22 After Mead got back in the car with Martin, the three officers again used  
23 their two vehicles to box in plaintiff. Martin Decl. ¶ 11; Mead Decl. ¶ 8. All  
24 three officers exited their vehicles and approached plaintiff with pistols drawn.  
25 Martin Decl. ¶ 12; Mead Decl. ¶ 9; Nguyen Decl. ¶ 7. They all identified  
26 themselves as police and commanded plaintiff to get out of his car. Id. Plaintiff  
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1 did not respond, so Nguyen opened the car door and Martin and Nguyen pulled  
2 plaintiff out of his car. Martin Decl. ¶ 12; Nguyen Decl. ¶ 8.

3 After the officers got plaintiff onto the asphalt face down, plaintiff went  
4 rigid and began resisting arrest by tugging his body away from the officers and  
5 by tucking his arms and hands underneath his chest and waist area. Martin Decl.  
6 ¶ 13; Mead Decl. ¶ 10; Nguyen Decl. ¶ 8. Mead placed his left knee on  
7 plaintiff's upper back to prevent him from moving. Mead Decl. ¶ 11. The  
8 officers repeatedly ordered plaintiff to give them control of his hands, but  
9 plaintiff refused and continued to tuck them underneath his waist area. Martin  
10 Decl. ¶ 13; Mead Decl. ¶ 10. In an attempt to get control of plaintiff's hands,  
11 Martin punched plaintiff in the left torso ten times and delivered two knee strikes  
12 to the same area. Martin Decl. ¶¶ 13, 14. Nguyen also punched plaintiff five  
13 times in the middle of his back, but to no avail. Nguyen Decl. ¶¶ 10-11. Fearing  
14 that plaintiff might be reaching for a weapon carried near his waistband, Mead  
15 struck plaintiff in the right side of his face three times in order to bring plaintiff's  
16 hands towards his face. Mead Decl. ¶¶ 12-13. Throughout this entire struggle,  
17 the officers and plaintiff were at risk of being struck by cars passing by in the  
18 next lane. Clouse Decl. ¶ 7; Mead Decl. ¶ 12; Nguyen Decl. ¶ 10. Eventually,  
19 the officers gained control of plaintiff's hands, handcuffed him and pulled him  
20 onto the sidewalk. Martin Decl. ¶ 15; Mead Decl. ¶ 13; Nguyen Decl. ¶ 12.

21 At around the time the three officers handcuffed plaintiff, Sergeant Clouse  
22 arrived on the scene and called for a transport to take plaintiff to the SCPD  
23 station. Clouse Decl. ¶ 9. Officer Enos was dispatched to transport plaintiff to  
24 the station. Enos Decl. (dkt. 23) ¶¶ 3-4. Plaintiff was later transported to Valley  
25 Medical Center to be treated for his injuries. Id. ¶ 6. Enos waited with plaintiff  
26 while he was treated. Id. Officer Pate was dispatched to Valley Medical Center  
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1 to transport plaintiff back to the police station. Pate Decl. (dkt. 28) ¶ 3. Pate  
2 transported plaintiff to the station and booked his blood sample into the evidence  
3 room. Id. ¶ 4.

4 Detective Henderson was not present during plaintiff's encounter with  
5 SCPD officers on September 21, 2011. Henderson Decl. (dkt. 24) ¶ 2.

6 2. Plaintiff's evidence

7 In support of his claim of use of excessive force during arrest,  
8 plaintiff submitted a verified complaint and declaration showing the following  
9 facts: Plaintiff was driving eastbound on the Southwest Expressway when two  
10 undercover police officers pulled him over. Verified Compl. ¶ 10; Lopez Decl.  
11 (dkt. 32-1) at 1. Plaintiff immediately pulled over. Lopez Decl. at 1. Instantly,  
12 officers Martin, Mead and Nguyen surrounded plaintiff's car and pointed their  
13 pistols at his head. Id. Officer Nguyen opened the car door and, with Officer  
14 Martin's help, pulled plaintiff out of the car and threw him onto the ground. Id.  
15 Plaintiff did not resist. Id. at 2. But the officers nonetheless proceeded to punch  
16 plaintiff's face and kick plaintiff's ribs repeatedly. Id.; Verified Compl. ¶ 11. As  
17 plaintiff was about to lose consciousness, the officers pulled plaintiff's arms  
18 behind his back and dislocated his shoulder. Id. ¶ 12. After handcuffing  
19 plaintiff, the officers continued to punch and kick plaintiff's back, arms and face.  
20 Id. ¶ 13.

21 3. Analysis

22 While the test for reasonableness is often a question for the jury,  
23 this issue may be decided as a matter of law if, in resolving all factual disputes in  
24 favor of the plaintiff, the officers' force was "objectively reasonable" under the  
25 circumstances. Gregory v. County of Maui, 523 F.3d 1103, 1108 (9th Cir. 2008);  
26 Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994). Under the circumstances  
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described by the facts set forth by defendants, the use of force by officers Martin, Mead and Nguyen in the course of restraining and detaining plaintiff appears to have been objectively reasonable. Plaintiff was resisting arrest by tucking his arms and hands under his chest and waist area, and ignoring repeated requests to let out his hands so he could be handcuffed. The officers were fearful that plaintiff was armed with a weapon and would attempt to use it if they did not gain control of his hands. Additionally, the officers were in close proximity to passing traffic and at great risk of being struck by a car if they could not quickly restrain plaintiff and diffuse the situation. Under these circumstances, the force used by officers Martin, Mead and Nguyen in order to gain control of plaintiff's hands may be said to have been objectively reasonable. Cf. Marquez v. City of Phoenix, 693 F.3d 1167, 1174-76 (9th Cir. 2012) (officers did not use excessive force in tasing a suspect after they pushed past a barricade and entered a blood-spattered room, with an injured adult and a child in evident distress, and warned arrest-resisting suspect they would tase him if he did not comply with their commands). And Sergeant Clous, Detective Henderson and officers Enos and Pate had nothing to do with the use of force against plaintiff.

Plaintiff's version of the facts is different. In his opposing declaration, plaintiff alleges that, "[w]ithout any resistance from me at all," officers Martin and Nguyen "pulled me out of my vehicle and threw me onto the ground knocking the wind out of me." Lopez Decl. at 1. And "while on the ground, face down, lying on my stomach, with the wind knocked out of me and almost unconscious," Martin, Mead and Nguyen proceeded to "punch[] me in my face, kick[] me in the ribs and beat[] me repeatedly," while saying, "'he's a fuckin Norteno, beat his ass!'" Id. at 2. There was no reason to beat me repeatedly because "I did not resist arrest." Id.



1 Plaintiff further alleges under penalty of perjury in his verified complaint,  
2 which the court will treat as an opposing declaration,<sup>2</sup> that:

3 12. Once I began to lose consciousness, these officers pulled my arms  
4 behind my back to the point of dislocating my shoulder in order to  
handcuff my wrists.

5 13. After being handcuffed with a dislocated shoulder, I was still being  
6 kicked and punched on my back, arms and face. In addition, these officers  
stomped my face into the ground repeatedly while in handcuffs.

7 Verified Complaint ¶¶ 12-13.

8 Even when viewing the evidence in the light most favorable to plaintiff,  
9 no reasonable jury could find that Sergeant Clous, Detective Henderson or  
10 officers Enos or Pate used excessive force against plaintiff in violation of his  
11 Fourth Amendment rights. There is no evidence showing that Sergeant Clous,  
12 Detective Henderson or officers Enos or Pate actually and proximately caused the  
13 deprivation of plaintiff's Fourth Amendment rights. See Leer v. Murphy, 844  
14 F.2d 628, 634 (9th Cir. 1988) (conclusory allegations insufficient to defeat  
15 summary judgment). Sergeant Clous, Detective Henderson and officers Enos and  
16 Pate are entitled to summary judgment as a matter of law. See Celotex, 477 U.S.  
17 at 323. But the same cannot be said of officers Martin, Mead and Nguyen.

18 When viewing the evidence in the light most favorable to plaintiff, a  
19 reasonable jury could find that officers Martin, Mead and Nguyen used excessive  
20 force against plaintiff. Even if the use of some force was justified to promptly  
21 handcuff plaintiff and move him away from oncoming traffic, a reasonable jury  
22 could find that repeatedly punching and kicking plaintiff while he was on the  
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24 <sup>2</sup>A verified complaint may be treated as an opposing affidavit or  
25 declaration where, as here, plaintiff states under penalty of perjury that the  
26 allegations are true and correct, and the allegations are based on his personal  
27 knowledge. See Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir.  
28 1995).

1 ground, face down and not resisting arrest amounted to excessive use of force.  
2 See Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002) (even where some force is  
3 justified, amount actually used may be excessive). And a reasonable jury could  
4 find that officers Martin, Mead and Nguyen used excessive force if they kicked,  
5 punched and stomped plaintiff's face into the ground after plaintiff was  
6 handcuffed. See Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d  
7 1052, 1059 (9th Cir. 2003) (although some force was justified in restraining  
8 mentally ill individual so he could not injure himself or officers, once he was  
9 handcuffed and lying on ground without offering resistance, officers who knelt  
10 on him and pressed their weight against his torso and neck despite his pleas for  
11 air used excessive force).

12 Officers Martin, Mead and Nguyen are not entitled to summary judgment  
13 on plaintiff's Fourth Amendment excessive force claim. Nor are they entitled to  
14 qualified immunity at this stage in the proceedings. Whether Martin, Mead  
15 and/or Nguyen may be said to have made a "reasonable mistake" of fact or law  
16 entitling them to qualified immunity, Saucier v. Katz, 533 U.S. 194, 205 (2001),  
17 will depend on the resolution of disputed facts and the inferences that may be  
18 drawn therefrom. See Santos, 287 F.3d at 855 n.12. Until the jury makes such  
19 decisions, a court cannot determine whether a reasonable officer could have  
20 mistakenly believed that the degree of force used was lawful under the  
21 circumstances. See id.

## 22 CONCLUSION

23 For the foregoing reasons, defendants' motion for summary judgment (dkt.  
24 18) is GRANTED as to Sergeant Clous, Detective Henderson and officers Enos  
25 and Pate, and DENIED as to officers Martin, Mead and Nguyen. The court finds  
26 that a referral to a magistrate judge for settlement proceedings is in order and  
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1 hereby REFERS this matter to Magistrate Judge Vadas for settlement  
2 proceedings. All other proceedings are stayed.

3 A settlement conference shall take place within 120 days of the date of  
4 this order, or as soon thereafter as is convenient to Magistrate Judge Vadas'  
5 calendar. Magistrate Judge Vadas shall coordinate a time and date for the  
6 conference with all interested parties and/or their representatives and, within ten  
7 (10) days after the conclusion of the conference, file with the court a report  
8 regarding the conference.

9 The clerk shall provide a copy of this order to Magistrate Judge Vadas.  
10 SO ORDERED.

11 DATED: August 19, 2014

  
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12 CHARLES R. BREYER  
13 United States District Judge  
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